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SYAIFUL AMRI MATIMBANG (SUING AS THE HUSBAND AND LAWFUL DEPENDANT TO YULMA ABDUL GAFAR) & ORS v. DATUK BANDAR KUALA LUMPUR & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMON NO: WA-23NCVC-4-01-2023]
2 AUGUST 2024
[2024] CLJ JT (12)

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Abstract – *The local authority ought to implement a holistic and responsive response to danger of falling trees, more so, in our country which is in the monsoon belt and where reports of trees falling and killing innocent bystanders are too many to be ignored. While the local authority may not be liable if the trees that are protruding danger are on private land, s. 101 of the Local Government Act 1976 is construed to impose a statutory duty to maintain the trees in several instances, one of which, the private land where the trees are planted is one which the members of public have a right of way.*

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LOCAL GOVERNMENT: *Local authority – Maintenance and repair – Negligence – Huge branch of tree fell upon head of deceased and killed her – Tree located on private land which members of public had right of way – Local authority alerted on sick condition of tree by landowner of private land before occurrence of accident but no action taken – Whether local authority owed statutory duty to maintain tree located in private land which members of public had right of way – Local Government Act 1976, s. 101(cc)(i)*

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TORT: *Negligence – Damages – Claim for – Suit by widower and children of deceased against local authority – Deceased died as result of huge tree branch falling on her head – Tree located on private land – Whether local authority owed statutory duty to maintain tree located in private land which members of public had right of way – Whether widower and children of deceased entitled to damages, including aggravated and exemplary damages*

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The case pertained to an accident where a huge branch of a tree fell upon the head of an operator of a restaurant ('deceased'), which resulted in her death ('accident'). The said tree was situated on a piece of land which was owned by Megasas Properties Sdn Bhd ('second defendant'), and on which the deceased was running her restaurant business. The accident occurred at the time the deceased together with her family were walking on the said land. According to the second defendant, before the accident happened, they had lodged a complaint regarding the sick condition of the tree to the Mayor of Kuala Lumpur ('first defendant'), but the first defendant proceeded to close

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the complaint, claiming the matter fell under the responsibility of the second defendant. Due to the accident, the family members of the deceased ('plaintiffs') filed a suit against the first defendant for negligence and breach of statutory duty under the Local Government Act 1976 ('Act'). In resisting the suit, the first defendant posited that: (i) they did not owe any liability to the deceased/plaintiffs; and (ii) they were not liable to pay the aggravated and exemplary damages. The first defendant argued that they did not owe any statutory duty to the deceased/plaintiffs as they only owed statutory duty of care to maintain a tree in the following circumstances: (i) if the tree was planted on a private land but its branches had protruded out to a public space; (ii) if the tree was planted on public areas; and (iii) if the tree was planted on areas gazetted as green lungs, *ie*, parks, public road roadsides or reserves. The issues that arose in this suit were: (i) whether the first defendant owed a statutory duty under the Act to members of the public to maintain a tree which was wholly on a private land but which the public was allowed access; and (ii) whether the plaintiffs were entitled to aggravated and exemplary damages.

Held (allowing suit):

(1) The first defendant owes statutory duty to maintain a tree under s. 101 of the Act if the tree is planted: (i) on a private land but its branches protrude out to a public road or street; (ii) on public areas; (iii) on areas gazetted as green lungs, *ie*, parks, public road roadsides or reserves; and (iv) on a private land which the public have a right of way. (para 22)

(2) When the first defendant issued licenses to the owner of a private land to operate restaurants which were opened to the public, he owed statutory duty under s. 101(cc)(i) of the Act to the public to constantly supervise and trim all hazardous trees which were wholly on that private land. Although the word 'road' is not defined under s. 2 of the Act, the word 'street' can be defined to include any road, square, footway, passage or service road, whether a thoroughfare or not, over which the public have a right of way. It was clear s. 101, read with s. 2 of the Act, apply to a tree wholly on a private land if the public have a right of way on that private land. The first defendant clearly owes statutory duty under s. 101(cc)(i) of the Act to the public to maintain trees which are wholly on a private land which the public have a right of way. The first defendant was liable for the death of the deceased. (paras 25-31)

(3) This was a fit and proper case for awarding exemplary damages. It was high time that the first defendant implemented a holistic and responsive response to the dangers of falling trees. Reports of trees falling and killing innocent bystanders were too many to be ignored. RM30,000 was awarded as exemplary damages as the evidence showed that the relevant department of the first defendant was alerted to the danger of

A the said tree. Yet, the staff refused to take any action thereby allowing a branch of the tree to fall and tragically kill the deceased. The suit was ruled in the favour of the plaintiffs. The plaintiffs were also awarded with: (i) RM1,518,060 as general damages; (ii) RM90 as agreed special damages; and (iii) interest and costs. (paras 35-36 & 38)

B **Case(s) referred to:**
Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(refd)***
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***

Legislation referred to:
Local Government Act 1976, ss. 2, 101(cc)(i)

C *For the plaintiffs - Raja Nurul Iylia Raja Mohd Tajuddin, Nur Amalina Haris, Intan Sharina Ahmad Sharizal & Lina Mysarah Amiyamin; M/s Raja Nur Iylia & Assocs*
For the 1st defendant - Zainol Aziz Mohamad; M/s Zainol, Kiong & Azizi

D *Reported by Syamim Ariffin*

JUDGMENT

Leong Wai Hong JC:

Introduction

E **[1]** Let's say there is a piece of privately-owned vacant land with big shady trees. With the permission of the local authority, the owner decides to lease the land to food operators to run restaurants. If a tree falls on a food operator or a customer, is the local authority like the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur liable to the injured food operator or
F customer?

[2] This issue of public importance arose in the trial before me. The issue I will frame as follows:

> Does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe
G a statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but which the public was allowed access?

[3] The trial arose out of a tragic death incident that occurred to a lady with the name of Yulma binti Abdul Gafar ("deceased") when a huge branch
H from a tree fell on her head on 19 December 2021 ("tree").

[4] The first plaintiff is the widower of the deceased who brought the suit as the husband and lawful dependant of the deceased. The second to sixth plaintiffs are the children of the deceased.

I **[5]** The first defendant is Datuk Bandar Kuala Lumpur/the Mayor of Kuala Lumpur. The second defendant is Megasas Properties Sdn Bhd which owns the land where a branch from the tree fell on the deceased's head. Megasas Properties Sdn Bhd did not enter an appearance to defend the suit.

Thus, the trial proceeds against the Datuk Bandar Kuala Lumpur only. In this judgment I will refer to the first defendant as Datuk Bandar Kuala Lumpur and the second defendant as Megasas Properties.

[6] Before the trial started, the plaintiffs and the Datuk Bandar Kuala Lumpur agreed to the pleaded sums of RM1,518,060 as general damages and RM90 as special damages and interest as pleaded at 5% p.a. from the date of judgment (see amended statement of claim at para. 30). The Datuk Bandar Kuala Lumpur only contested liability and the claim for aggravated and exemplary damages. (See notes of proceedings p. 7).

[7] The trial was heard over two days on 26 February 2024 and 4 April 2024. On 21 June 2024 after hearing oral submissions, I ruled in favour of the plaintiffs and ordered the Datuk Bandar Kuala Lumpur to pay to the plaintiffs:

(i) RM1,518,060 as agreed general damages, RM90 as agreed special damages and RM30,000 as exemplary damages to the plaintiff;

(ii) interest on these sums from the date of judgment at 5% p.a. till full payment; and

(iii) costs of RM15,000 subject to allocatur.

[8] The Datuk Bandar Kuala Lumpur filed an appeal to the Court of Appeal on 17 July 2024. The notice of appeal wrongly stated that the appeal is against my entire decision. As stated earlier, Datuk Bandar Kuala Lumpur, at the trial, only contested liability and the claim for aggravated and exemplary damages. (See notes of proceedings p. 7). These are my grounds of judgment.

Background Facts

[9] The deceased was operating an ikan bakar restaurant known as lkan Bakar Seri Tanjung at No. 437, Lot 668, Seksyen 47, Jalan Bidor, Off Jalan Pahang, 53000 Kuala Lumpur ("business premise"). She was a tenant of the landowner, Megasas Properties.

[10] The deceased, on 19 December 2021, was walking on the business premise with her family members when a huge branch from the tree fell on her head. Tragically, she died.

[11] The deceased's family sued the Datuk Bandar Kuala Lumpur for negligence and breach of statutory duty under the Local Government Act 1976.

[12] The evidence shows that prior to the tree branch falling, one Encik Azwad, a representative of Megasas Properties, had lodged a written complaint to the Datuk Bandar Kuala Lumpur on 17 May 2021 that the tree was in a sick condition, which the Datuk Bandar Kuala Lumpur replied on

3 June 2021 that the land owner Megasas Properties was responsible and proceeded to close the complaint (See record of complaint dated 17 May 2021 in encl. 31 common bundle of documents marked B3 at p. 24]. (See also encl. 67. First defendant's written submissions at paras. 73 to 74).

[13] It is also an agreed fact that the Datuk Bandar Kuala Lumpur had closed the complaint made online by Megasas Properties (See encl. 23 statement of agreed facts marked E at para. 2).

Court Pleadings

The Pleaded Case Of The Plaintiffs

[14] The plaintiffs contend that Datuk Bandar Kuala Lumpur owes a statutory duty under the Local Government Act 1976 to the deceased.

The Pleaded Defence

[15] The Datuk Bandar Kuala Lumpur denies owing a statutory duty under the Local Government Act 1976 to the deceased.

[16] In its post-trial written submissions in encl. 67 and encl. 74, the Datuk Bandar Kuala Lumpur did not submit that even if a statutory duty is owed there was no breach of that duty. Hence, I need not consider this issue.

The Trial Process

[17] The plaintiffs called three witnesses. They are:

(i) Nor Sherizan binti Darus, PW1;

(ii) Zarul Azham bin Mohd Nordin, PW2; and

(iii) Syaiful Amri bin Matimbang, PW3.

[18] The Datuk Bandar Kuala Lumpur called two witnesses. They are:

(i) Alpiza binti Abdullah, DW1; and

(ii) Mohd Hafiz bin Abdullah, DW2.

[19] The plaintiffs filed written submissions in encls. 70 and 75. The Datuk Bandar Kuala Lumpur filed written submissions in encls. 67 and 74.

The Issues Before This Court

[20] The issues to be determined by this court are:

(i) does the Datuk Bandar Kuala Lumpur/The Mayor of Kuala Lumpur owe a statutory duty under the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but which the public was allowed access?

(ii) are the plaintiffs entitled to aggravated and exemplary damages?

Issue 1 – Does The Datuk Bandar Kuala Lumpur/The Mayor Of Kuala Lumpur Owe A Statutory Duty Under The Local Government Act 1976 To Members Of The Public To Maintain Trees Which Are Wholly On Private Land But Which The Public Was Allowed Access?

Datuk Bandar Kuala Lumpur's Contentions

[21] Datuk Bandar Kuala Lumpur contends they only owe a statutory duty of care to maintain a tree in the following three instances:

(i) if the tree is on private land but its branches protrude out to a public road or street;

(ii) if the tree is planted on public areas; and

(iii) if the tree is planted on areas gazetted as green lungs like parks, public road roadsides or reserves.

Court's Analysis

The Law

[22] I consider it settled law that the Datuk Bandar Kuala Lumpur owes a statutory duty under s. 101 of the Local Government Act 1976 to maintain a tree:

(i) if the tree is planted on private land but its branches protrude out to a public road or street;

(ii) if the tree is planted on public areas;

(iii) if the tree is planted on areas gazetted as green lungs like parks, public road roadsides or reserves; and

(iv) if the tree is planted on private land but to which the public have a right of way.

[23] Raus Sharif PCA, in *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 FC, said in clear and affirmative terms the statutory duty imposed on the defendant Dato' Bandar Kuala Lumpur under s. 101 of the Local Government Act 1976:

> [21] It is clear from the report prepared by the defendant that *the fallen tree was actually from two pieces of private land which the defendant had no control over. Thus, the defendant's stance was that any mishap to the road users caused by the trees located on private land was not within their jurisdiction. With respect, I disagree. In my considered view it does not matter that the tree was on a private land, as under the Act the defendant can require the owner or occupier of any premises to remove or trim the tree. The Act also does not prohibit the defendant from entering any private land to cut or trim trees that pose a danger to the public. The defendant should have constantly supervised and trimmed all hazardous* trees, immaterial of whether the trees stood on its land or otherwise. Section 101 of the

A Act clearly imposes a duty of care on the defendant, with the duty extending to the defendant to enter into private land to remove or lower or trim any tree, shrub or hedge before they cause any harm in light of the private land owner's neglect or failure to remove or trim the trees. (emphasis added)

B **[24]** Section 101 of the Local Government Act 1976 reads as follows:

In addition to any other powers conferred upon it by this Act or by any other written law *a local authority shall have power to do all or any of the following things, namely:*

...

C (cc) *to require the owner or occupier of any premises to do any of the following acts:*

(i) *to remove, lower or trim to the satisfaction of the local authority any tree,* shrub or hedge overhanging *or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or which in the opinion of the local authority is likely to endanger the public safety or convenience* and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof; (emphasis added)

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[25] In my view, when the Datuk Bandar Kuala Lumpur has issued licences to the owner of a private land to operate restaurants which are open to members of the public, he owes a statutory duty under s. 101(cc)(i) of the Local Government Act 1976 to members of the public to constantly supervise and trim all hazardous trees which are wholly on this private land.

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[26] The existence of such a duty has been clearly set out by Raus Sharif PCA in *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 FC as follows:

G [21] … In my considered view it does not matter that the tree was on a private land, as under the Act the defendant can require the owner or occupier of any premises to remove or trim the tree. The Act also does not prohibit the defendant from entering any private land to cut or trim trees that pose a danger to the public. The defendant should have constantly supervised and trimmed all hazardous trees, immaterial of whether the trees stood on its land or otherwise…

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[27] Further, s. 101(cc) reads as follows:

(cc) to require the owner or occupier of any premises to do any of the following acts:

I to remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging **or interfering in any way with the traffic on any road or street.** (emphasis added)

[28] The word 'road' is not defined in s. 2 of the Local Government Act 1976. But street is defined as follows: A

> "street" includes any road, square, footway, passage or service road, whether a thoroughfare or not, **over which the public have a right of way,** and also the way over any bridge, and also includes any road, footway or passage, open court or open alley, used or intended to be used as a means of access to two or more holdings whether the public have a right of way over it or not, and all channels, drains and ditches at the side of any street shall be deemed to be part of such street. B
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> (emphasis added)

[29] Therefore "street" includes any road, square, footway, passage or service road, whether a thoroughfare or not, over which the public have a right of way. Thus, it is clear s. 101 read with s. 2 of the Local Government Act 1976 apply to a tree wholly on a private land if the public have a right of way on that private land. C

[30] Clearly, the Datuk Bandar Kuala Lumpur owes a statutory duty under s. 101(cc)(i) of the Local Government Act 1976 to members of the public to maintain trees which are wholly on private land but to which the public have a right of way. D

[31] In conclusion, I hold that the Datuk Bandar Kuala Lumpur is liable to the plaintiffs for the death of the deceased. E

Issue 2 – Are The Plaintiffs Entitled To Aggravated And Exemplary Damages?

[32] In the submissions before me, the plaintiffs ask for RM100,000 as exemplary damages (See encl. 70 plaintiffs' written submission at para. 66). No claim was made for aggravated damages. F

The Law On Exemplary Damages

[33] The objective for an award of exemplary damages is to punish a defendant, and to display the court's indignant attitude towards the act committed by the defendant. The award of damages must reflect the sense of public outrage, emphasise the importance of the constitutional right of a plaintiff that has been breached by any servants of the Government, the gravity of the breach and to deter further breaches. The more serious the breaches, the higher is the quantum awarded for exemplary damages. (See *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141 FC). G H

[34] In *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141 the Federal Court said:

> [123] In approving the Court of Appeal's decision to award exemplary damages to the respondent, we cite with approval the sentiments expressed the learned judges therein as stated in the following paragraphs of the court's judgment: I

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46. We are also of the unanimous view that this was a proper case for exemplary damages to be awarded to register the court's disdain of law enforcement officers want only disregarding the rules and procedures that determine the parameters of their duties and responsibilities …

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47. James Foong J (as he then was) in *Rohairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] CLJ Supp 39 had set the guidelines for awarding exemplary damages in the following terms:

> While considering the request for exemplary damages, this Court must bear in mind that *the objective for an award under this category is to punish the defendants, and to display the Court's indignant attitude towards the acts committed by the defendants.* However, from the enlightening judgment of Lord Devlin in *Rookes v. Bernard* [1946] AC 1129, such damages must be restricted to situations where there are:
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> … oppressive, arbitrary or unconstitutional action by the servants of the Government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'.
>
> Outside these 2 categories, exemplary damages should not be awarded.
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> …
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> [124] We hasten to add that *the award of damages must also reflect the sense of public outrage,* emphasise the importance of the constitutional right and *the gravity of the breach and deter further breaches* (see: *Attorney General of Trinidad and Tobago v. Ramanoop* [2006] 1 AC 328). We also note that apart from the physical injury occasioned by the assaults, there is also the intangible harm such as the distress and injured feelings suffered by the respondent during the period of his detention. We would further add that the actions of the police in this case have indeed shocked this court thereby warranting the award of exemplary damages.
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> (emphasis added)

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Application To Facts

[35] This is a fit and proper case for the court to order an award of exemplary damages. It is high time that Datuk Bandar Kuala Lumpur implement a holistic and responsive response to the dangers of falling trees. Our country is in the monsoon belt with two monsoon seasons. The primary rains generally fall in October and November while the secondary maximum generally falls from April to May. Reports of trees falling and killing innocent bystanders are too many for the court to ignore.

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[36] I award RM30,000 as exemplary damages as the evidence shows the relevant department of the Datuk Bandar Kuala Lumpur was alerted to the danger of the tree. Yet, the staff of Datuk Bandar Kuala Lumpur chose not to take any action thereby allowing a branch of the tree to fall and tragically killed the deceased (see record of complaint dated 17 May 2021 in encl. 31 common bundle of documents marked B3 at p. 24, encl. 67 first defendant's written submission at paras. 73 to 74 and encl. 23 statement of agreed facts marked E at para. 2).

[37] I thank the counsel for the parties for their submissions which had greatly assisted me.

Decision

[38] For the reasons above, I rule in favour of the plaintiffs and order the Datuk Bandar Kuala Lumpur to pay to the plaintiffs:

(i) RM1,518,060 as agreed general damages, RM90 as agreed special damages and RM30,000 as exemplary damages to the plaintiffs;

(ii) interest on these sums from the date of judgment at 5% p.a. till full payment; and

(iii) costs of RM15,000 subject to allocatur.